

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SUSAN D. DONALDSON,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
NATURAL RESOURCES),
Appellee.

CASE NO. 94-MA-15

STATE OF IOWA
PUBLIC EMPLOYMENT
RELATIONS BOARD
SEP 27 PM 2:59

PROPOSED DECISION AND ORDER

Appellant Susan D. Donaldson has filed a state employee grievance appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 19A.14(1) and 621 IAC 11.2(19A, 20). Donaldson's appeal alleges that the Iowa Department of Natural Resources (DNR) failed to substantially comply with Iowa Department of Personnel (IDOP) rule 13.2, 581 IAC 13.2(19A), in connection with her employee performance evaluation for the year ending October 31, 1993.

A public hearing of the appeal was conducted at PERB's offices before the undersigned, Donaldson appearing *pro se* and the State by Jenifer Weeks.

FINDINGS OF FACT

In April, 1990, Donaldson began employment as a Senior Systems Analyst Supervisor in the Des Moines office of DNR's data processing (DP) bureau, a component of DNR's Administrative Services Division. She joined three existing DP bureau supervisors--a Bureau Chief and another Senior Systems Analyst Supervisor in Des Moines, and a third Senior Systems Analyst Supervisor assigned to the bureau's Iowa City office.

The DP bureau's supervisory structure soon changed. In August or September, 1990, the bureau chief was demoted to a nonsupervisory position, and soon thereafter the other Senior Systems Analyst Supervisor in Des Moines resigned, leaving Donaldson as the sole supervisory employee in the Des Moines office.

Administrative Services Division Administrator Stanley Kuhn, to whom the DP bureau chief had reported, assumed responsibility over the bureau, but Donaldson assumed the actual supervision of the bureau's staff and soon became the *de facto* bureau chief, although her classification as a Senior Systems Analyst Supervisor was not changed.

By the spring of 1991 Kuhn had received applications, including Donaldson's, for the vacant bureau chief position. He attempted to secure authorization to fill the vacancy, but his request was denied by the Department of Management due to a then-effective statewide freeze on hirings and reclassifications. Although Donaldson continued in her *de facto* bureau chief role, her performance plan was not updated to reflect the new duties and responsibilities she had in fact assumed.

In November, 1991, Donaldson received a very favorable (final composite rating of 4.7) performance evaluation from Kuhn for the 12 months ending October 31, 1991, which recognized her *de facto* role and the "remarkable turnaround in the attitude and productivity" of the DP staff which she had fostered. Kuhn rated Donaldson as highly as he did because he wanted to encourage her

and recognize what he felt had been an extraordinary performance under the circumstances (working outside her assigned class with very little experience as a manager). No new performance plan reflecting her *de facto* bureau chief duties was prepared for the ensuing 12-month evaluation period.

In early 1992 Kuhn sought a specific exemption from the continuing hiring/reclassification freeze so that he could secure a new classification for Donaldson which coincided with her actual function and duties. In July, 1992, Kuhn was granted the requested exemption, and thereafter Donaldson was reclassified as a Data Processing Administrator II in official recognition of her bureau chief role, which included supervisory authority over the bureau's Iowa City office.

Although the record does not contain a precise date, sometime in October, 1992, Donaldson was given a new performance plan which Kuhn had prepared for the upcoming evaluation period of November 1, 1992 through October 31, 1993. This new performance plan specified Donaldson's duties, and management's performance expectations, in her new Data Processing Administrator II classification.

In December, 1992, Kuhn presented to and discussed with Donaldson his evaluation of her performance for the 12-month period which had ended on October 31, 1992, and which had been prepared by reference to her "old" performance plan. While still very favorable (final composite rating of 3.7), Donaldson's performance in each of the four major areas of responsibility listed on the performance plan was rated lower than on the evaluation prepared in

1991. Kuhn rated Donaldson's performance as he did because, although believing that the DP bureau was generally functioning well despite external difficulties, he was concerned about what he perceived as Donaldson's staff's attitude toward DP problems experienced by DNR's Environmental Protection Division and her admitted problem with the timely completion of performance evaluations for her subordinates.

Sometime during the spring of 1993 the Senior Systems Analyst Supervisor position in the DP bureau's Iowa City office was eliminated, leaving Donaldson as the sole supervisory employee in the bureau statewide. Following Donaldson's performance evaluation in late 1992, a number of factors combined to cause DNR management to consider and ultimately adopt a plan for the reorganization of the Administrative Services Division and its data processing operations. The plan was an attempt to provide more effective services, cope with budget restrictions and implement a legislative directive to reduce the layers of executive branch managers and supervisors. Although the record is not specific as to the date, at some point it was determined that a reduction in force (RIF) would be implemented as part of the reorganization, which would result in the elimination of Donaldson's Data Processing Administrator II/bureau chief position.

In late October, 1993, the decision to RIF Donaldson's position as part of the reorganization apparently having been made, Kuhn turned to the task of evaluating Donaldson's performance for the 12-month period ending October 31. He recalled having prepared

a new performance plan reflecting Donaldson's duties as a Data Processing Administrator II, but was unable to locate the document. Instead, Kuhn took a copy of Donaldson's former performance plan (for her prior position as a Senior Systems Analyst Supervisor), changed the dates for the plan period to reflect the 12-month period then ending, and utilized that performance plan to prepare Donaldson's evaluation.

On or about November 2, 1993, Kuhn advised Donaldson that her position would be the subject of a RIF. On November 5 he presented her with what Donaldson describes as "the RIF paperwork" and the recently-prepared evaluation of her performance for the year ending October 31, 1993. For each of the major responsibilities reflected on the performance plan Kuhn had used, he rated Donaldson's performance as "3", representing competent performance. The evaluation thus yielded a composite score of "3.0".

No discussion of the substance of the performance evaluation took place at that time. Instead, the record indicates that Kuhn presented Donaldson with the evaluation, asking that she review it and attach any written comments she might have, and suggests that he indicated he would discuss it with her after she had done so.

On November 17, 1993, Donaldson signed the evaluation and returned it to Kuhn, together with her written comments which addressed three of the four responsibilities Kuhn had rated. Generally, Donaldson's comments defended her performance during the evaluation period, asserted that her ratings should be higher, and

maintained that a number of Kuhn's comments in the evaluation were not supported by evidence.

Also on November 17, Donaldson delivered to Kuhn the noncontract grievance which ultimately spawned the present PERB proceeding. In her grievance she complained of the absence of any discussion on November 5 between her and Kuhn concerning the evaluation, the performance ratings themselves, and Kuhn's notation that no salary increase was possible for Donaldson.

On November 24, 1993, Kuhn issued a memorandum to Donaldson which he characterized as DNR's "second step response" to her grievance. In it he expressed his continuing intent to meet with her as part of the evaluation procedure to discuss the substance of the challenged evaluation (but his inability to do so prior to the grievance's filing due to Donaldson's authorized absence from the work place), and reaffirmed his belief that she was ineligible for a raise. Kuhn declined to address the merits or "fairness" of the evaluation ratings, however, until a evaluation conference was conducted. Donaldson advanced her grievance to the third step of the uniform procedure set out in IDOP's rules.

On November 30, 1993, Kuhn and Donaldson met and discussed the substance of the evaluation. At the conclusion of this evaluation conference Kuhn provided Donaldson with a copy of the evaluation (which by then had also been signed by the DNR director), together with a copy of the performance plan upon which it had been based. It was only following her receipt of these documents that Donaldson became aware that the evaluation had been based upon the old

performance plan applicable to her former position as a Senior Systems Analyst Supervisor, rather than the performance plan which Kuhn had prepared for her new position and given to her near the start of the evaluation period.

Sometime during December, 1993, following the effective date of her RIF, Donaldson assumed a position within DNR as a Systems Programmer--a nonsupervisory classification she had elected to bump into as a consequence of the RIF (and the position she continued to occupy as of the date of hearing).

A third-step proceeding on Donaldson's grievance was scheduled before a designee of the IDOP director. In a submission to the designee prior to the third-step proceeding itself, Donaldson abandoned both her complaint concerning the lack of an evaluation conference with Kuhn as well as the issue concerning her eligibility for a pay raise. At the third-step proceeding, however, she continued to assert that she had not received a fair and objective performance evaluation (as evinced in part by Kuhn's admitted use of the outdated performance plan in the evaluation process), and that her evaluation scores as to certain responsibilities should be higher.¹

¹The third-step meeting also addressed a separate grievance commenced by Donaldson, in which she asserted that her RIF was in retaliation for having made prior reports and complaints of sexual discrimination and harassment. The issues underlying that grievance are the subject of a separate proceeding in a different forum, and are not appropriately addressed here.

The IDOP director's designee denied the grievance in a decision dated March 28, 1994.² Donaldson subsequently filed the instant appeal.

Iowa Code section 19A.9(13) directs the Personnel Commission to adopt rules providing for "the regular evaluation, at least annually, of the qualifications and performance of [specified executive branch] employees."

Chapter 13 of IDOP's rules (Performance Planning and Evaluation) was consequently adopted. The pertinent rule provides:

581-13.2(19A) Minimum requirements.

13.2(1) Performance Plan. The performance plan shall be based on the responsibilities assigned by the supervisor during the evaluation period and shall include the standards required for performance to be considered competent. The performance plan shall be given to and discussed with the employee. Significant changes in responsibilities or standards that occur during the evaluation period shall be included in the performance plan, and a revised copy given to and discussed with the employee.

13.2(2) Performance Evaluation. A performance evaluation shall be prepared for each employee at least every twelve (12) months by the supervisor. Additional evaluations may be prepared at the discretion of the supervisor. Numerical ratings on the evaluation form shall be accompanied by descriptive comments supporting the ratings. The evaluation shall also include job related comments concerning areas of strength, areas for improvement, and training/development plans. The supervisor shall discuss the

²Although acknowledging Donaldson's claim concerning Kuhn's use of an outdated performance plan in the preparation of the challenged evaluation, the designee apparently believed that Kuhn had subsequently rewritten the evaluation based upon the correct performance plan. The record before me, however, contains nothing to support or even suggest such a finding.

evaluation with the employee and the employee shall be given the opportunity to attach written comments.

Periods of service during educational leave required by the appointing authority, or military leave, shall be considered competent (3.00).

Exit performance evaluations shall be completed by the former supervisor on or before the last day before the movement of an employee to employment in another section, bureau, division or agency of state government. This evaluation shall be for the period between the previous evaluation up to the movement to the other position. A copy shall be forwarded to the new supervisor of the employee.

Donaldson's appeal is brought pursuant to Iowa Code section 19A.14(1), which provides:

**19A.14 Grievances and Discipline
Resolution.**

1. *Grievances.* An employee, except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department of personnel rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty calendar days following receipt of the third step grievance.

If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act. Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel. Decisions by the public employment relations board constitute final agency action.

For purposes of this subsection, "uniform grievance procedure" does not include procedures for discipline and discharge.

CONCLUSIONS OF LAW

PERB's authority to decide the noncontract grievance appeals of State employees such as Donaldson arises from Iowa Code sections 20.1(4) and 19A.14(1). Section 20.1(4) notes the Board's power and duty adjudicate State merit system grievances, while section 19A.14(1), quoted above, provides further detail concerning the scope of that authority, the manner in which it is exercised and the procedures which are to be employed.

Particularly significant is the section 19A.14(1) directive that PERB's decisions in grievance appeal proceedings "shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel." Under this standard, for an employee to prevail in a grievance appeal before PERB, he or she must establish the employer's lack of substantial compliance with Iowa Code chapter 19A or IDOP rules. Stratton/Human Services, 93-MA-13; Taylor/Employment Services, 92-MA-08.

I.

Donaldson has asserted a lack of substantial compliance with IDOP rule 581-13.2(19A). That rule, when read in its entirety, establishes a system designed to inform the employee of his or her specific duties and the standards by which his or her performance will be judged, and to provide the employee with regular feedback concerning management's perception of the quality of the employee's

performance of those duties, judged by the stated standards. The key elements of this system are the performance plan, providing the employee with prospective notice of duties and standards, and the subsequent performance evaluation, reflecting an application of the stated standards to the employee's performance of the listed duties.

Inherent in this system are the concepts that the performance plan represents the responsibilities assigned during the evaluation period and the performance standards required, and that the performance evaluation is prepared with reference to the performance plan which was given to and discussed with the employee at the commencement of the evaluation period (or the amended plan given the employee during the period if significant changes have occurred).

A performance evaluation which is prepared with reference to a performance plan other than the one given the employee does not substantially comply with the minimum requirements of IDOP rule 581-13.2(19A). It necessarily follows that Kuhn's evaluation of Donaldson's performance for the 12-month period ending October 31, 1993, based as it was on a performance plan for a position she did not occupy during that evaluation period, and which had been superseded by a subsequent performance plan for her actual position, did not substantially comply with the rule.³

³The State maintains, in support of its argument that substantial compliance with rule 581-13.2 occurred, that the outdated performance plan actually utilized by Kuhn in the preparation of the challenged evaluation is substantially similar to the plan which should have been used. It does appear that

II.

Although both parties apparently agree that the invalidation of the challenged evaluation and its removal from Donaldson's personnel file are in order should it be concluded that a lack of substantial compliance with the rule occurred, their arguments concerning any additional aspects of an appropriate remedy are widely divergent.

The State maintains, in essence, that IDOP subrule 581-11.3(3)(b) provides the remedy. That provision, dealing with the computation of "retention points" to be utilized in RIF and bumping situations, provides, in effect, that an evaluation period for which an employee is not properly evaluated shall be treated, for retention point computation purposes, as though the employee had

substantial similarities exist between the two documents, as one would expect in view of the fact that both a Senior Systems Analyst Supervisor and a Data Processing Administrator II are supervisory positions and are involved with work in the same general subject area. The performance plans, however, are clearly not identical--a fact implicitly recognized by Kuhn's having devoted his time to the preparation of a new performance plan, which clearly contemplates a higher-level supervisory position and broader responsibilities.

The State also argues that because Donaldson's duties had not substantially changed from the previous evaluation period DNR was not even required to prepare a new performance plan, and that Kuhn's having done so should not be "held against" the DNR. I believe the State's arguments ignore the plain truth that a superseding performance plan for this specific period had in fact been prepared and given to Donaldson. Nor is the argument that a new performance plan was not required for her for 1992-93 persuasive. The argument seems to either imply that the classification system established and maintained by IDOP is so nebulous that the classifications of Senior Systems Analyst Supervisor and Data Processing Administrator II are merely labels without practical distinction, or to suggest that since her performance plan should have been revised much earlier, but was not, Donaldson cannot now complain about the continued use of an outdated plan.

performed competently (i.e., at the "3.0" level). The State thus maintains that the expungement of the flawed evaluation ends the matter--that the effect of expungement is to create an evaluation void, and that subrule 581-11.3(3)(b) then operates to fill that void.

Donaldson's approach is radically different. Throughout all stages of the grievance process, including the PERB proceedings, she has devoted substantial time and effort in an attempt to address and rebut nearly every adverse statement or inference concerning her performance which might be contained in or drawn from the challenged evaluation. Based upon her view of the quality of her performance compared to that of other DNR bureau chiefs under Kuhn, and her belief that Kuhn is incapable of evaluating her fairly and objectively, she argues that PERB should order her composite score for the evaluation period increased to "5.0", indicative of "outstanding" performance.

I cannot subscribe to either party's position. In fashioning an appropriate remedy, PERB attempts to place the prevailing grievant in the position he or she would have been in had no violation of chapter 19A or IDOP rule occurred. Israni/Natural Resources, 92-MA-23.

The evaluation system established by chapter 13 of IDOP's rules requires that clear notice of duties and expectations be given and that performance be evaluated with reference to those specific duties and expectations. Within those parameters, however, the individual employee's supervisor--presumably the

management representative in the best position to judge a subordinate's performance--is delegated the authority to evaluate and rate the employee's performance. Certainly some supervisors are more attentive, knowledgeable and diligent than others, and thus produce more insightful and helpful evaluations than do the less capable. And regardless of the capabilities of the supervisor preparing the evaluation, differences in opinion concerning the quality of an employee's performance are bound to occur. It seems likely that this reality prompted the adoption of the subrule 581-11.2(2) requirement that employees be given the absolute opportunity to attach written comments to the supervisor's evaluation--so that the record would reflect that differences of opinion did exist.

PERB's role in evaluation-based grievances is not to evaluate the evaluator or the merits of his or her subjective judgments, but instead is to insure that the evaluation scheme of the IDOP rule is substantially followed. I thus do not believe it appropriate for PERB to in effect redesign the evaluation system in an individual case and substitute its judgment for that of the party legitimately charged with (and presumably better qualified to perform) the duty of evaluating employee performance. Donaldson's proposed remedy would do just that, and would go far beyond merely placing her in the situation she should have been in had substantial compliance with the rule occurred. She was entitled to an evaluation of her performance of the duties specified on the applicable performance plan, judged by the stated standards, and an opportunity to attach

written comments if she chose. She was never entitled to an evaluation which she agreed with, or to have her performance evaluated by an unfamiliar third party after an evidentiary hearing at which she could litigate the factual accuracy of every impression which may have been formed in the mind of her evaluator during the evaluation period. For PERB to simply assume the role of the evaluator as a remedy for DNR's noncompliance would seem to be a perversion of the system at least as significant as Kuhn's use of the outdated performance plan.

Nor would the State's theory yield an appropriate remedy. The evaluation system is designed to produce a product--a written performance rating by the employee's supervisor, supported by descriptive comments, which is based upon previously-announced duties and standards, together with the responsive comments of the employee should he or she choose to make them. While a stop-gap measure such as IDOP subrule 581-11.3(3) may be necessary for the effective functioning of the State's layoff system, it cannot properly be applied in this situation so as to deprive Donaldson of her right to an evaluation in compliance with the rule, or to limit PERB's ability to fashion appropriate relief.

As the Board has implicitly recognized, its stated remedial goal is normally accomplished by the entry of an order which recreates the situation which existed prior to the breach of chapter 19A or IDOP rule, and which requires the parties to proceed from there in compliance with the applicable statutory provisions and rules. Israni, supra, at p. 17. While that is not always

possible or practical, in view of the occurrence of intervening events, the record contains nothing which reveals that such an order is impractical in the instant case.⁴ Consequently, I propose the entry of the following

ORDER

The grievance appeal of Susan D. Donaldson is hereby SUSTAINED.

The original and all copies of the invalid evaluation of Donaldson's performance as a DNR employee for the period November 1, 1992 through October 31, 1993, together with her written comments in response thereto, shall be removed from all personnel files maintained by the State.

Kuhn shall, within thirty days of the date below, prepare an evaluation of Donaldson's performance as a Data Processing Administrator II for the period November 1, 1992 through October 31, 1993, rating her performance on each of the major responsibilities specified on the performance plan given to

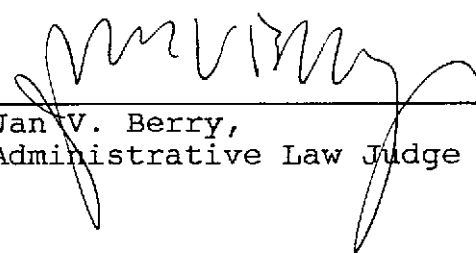
⁴Kuhn has suggested that his rating of Donaldson's performance would likely have been the same even had he utilized the appropriate performance plan. Perhaps that will ultimately prove to be true, but perhaps not. It certainly would not be consistent with Kuhn's duty as an evaluator for him to reevaluate Donaldson with the fixed purpose of justifying some predetermined score. To the extent that the invalid evaluation was based upon Kuhn's honest assessment of Donaldson's performance of duties which also appear on the appropriate performance plan, and was based upon an application of standards which appear on both documents, similarity in those rating might be expected. However, not all the duties and standards are identical. Kuhn's consideration of Donaldson's performance of even slightly different duties, judged by even slightly different standards, may in fact result in different ratings. Regardless of the scores eventually recorded, Donaldson is entitled to and should receive a performance evaluation prepared in substantial compliance with the rules.

Donaldson in October, 1992, applying the performance standards specified for each major responsibility on such plan, and in all other respects complying with the minimum requirements set forth in IDOP rule 581-13.2(19A), including a discussion of the evaluation with the employee.

The resulting evaluation, together with any written comments attached thereto by Donaldson, shall be substituted for the invalidated performance evaluation in each location where the prior evaluation or a copy thereof was maintained, and shall become the basis for any future computation of retention points for the period in question.

Should the evaluation ordered herein result in a final composite rating different than 3.0, any existing computation of retention points shall be adjusted to a level which accurately reflects such different final composite rating.

DATED at Des Moines, Iowa this 27th day of February, 1995.



Jan V. Berry,
Administrative Law Judge